

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Request to Update Default Compensation Rate)	WC Docket No. 03-225
For Dial-Around Calls from Payphones)	
)	

**OPPOSITION OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL
TO THE REQUEST FOR STAY OF THE
INTERNATIONAL PREPAID COMMUNICATIONS ASSOCIATION**

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The American Public Communications Council ("APCC") hereby opposes the International Prepaid Communications Association's ("IPCA's") request for stay ("IPCA Request") of the Commission's Report and Order in this proceeding, FCC 04-182, released August 12, 2004 ("*Order*"). In the *Order*, the Commission increased the rate of compensation received by payphone service providers ("PSPs") for dial-around calls originating from their payphones from \$.24 to \$.494 per call. IPCA represents providers, distributors, and issuers of prepaid phone cards, which are frequently used to make dial-around calls from payphones. IPCA has requested a stay pending the Commission's ruling on IPCA's petition for reconsideration, filed the same day ("IPCA Petition").

DISCUSSION

In order to obtain a stay of an agency rule, the requesting party must meet the four-part test as to whether (1) the requesting party is likely to prevail on the merits; (2) the requesting party will be irreparably harmed absent a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. *Washington Metro. Area*

Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). IPCA cannot meet any of these criteria.

IPCA contends that, if the Commission permits the new rate to take effect in the normal course, 30 days after Federal Register publication of the *Order*, the prepaid card providers, distributors, and issuers it represents will suffer “irreparable harm.” According to IPCA, the cards currently on the market – in consumers’ wallets, distributors’ shelves, and issuers’ inventories – have been produced with payphone surcharges designed to recover the costs resulting from the old \$.24 compensation rate. IPCA claims that if companies do not increase the surcharge to reflect the new \$.494 rate, they “stand to lose money on every payphone call – threatening their financial stability and even their continued existence.” IPCA Request at 1. IPCA, however, fails to show that its members could not timely increase their rates.

Moreover, the payphone industry and the public have been suffering harm from uncompensatory rates for at least the last two years. The alleged harm to prepaid card providers, even if it did occur, is far outweighed by the harm to PSPs and the public interest that would result from any further delay in implementing the new rate.

I. IPCA IS UNLIKELY TO PREVAIL ON THE MERITS

The petition for reconsideration underlying IPCA’s request for stay is based on the same claims as the request for stay itself. The petition merely amplifies somewhat the same allegations and arguments concerning the criteria for a stay that are summarized in the request for stay.¹ As APCC shows below, these allegations and

¹ In fact, IPCA’s request for stay is almost identical to the summary of IPCA’s petition for reconsideration. The only argument made in support of the petition that does not relate to the criteria for a stay is that, in preparing the Regulatory Flexibility Act analysis accompanying the *Order*, the Commission incorrectly counted the number of prepaid service providers. The Commission’s regulatory flexibility analysis is not

arguments are utterly without merit. Therefore, IPCA cannot prevail on the merits of its petition.

II. IPCA HAS FAILED TO SHOW IRREPARABLE HARM

IPCA contends that, if the Commission permits the new rate to take effect in the normal course, 30 days after Federal Register publication of the *Order*, prepaid card providers, distributors, and issuers will suffer “irreparable harm.” IPCA, however, utterly fails to support its claims with facts. IPCA attaches no documents or sworn declarations to back up its generalizations. Indeed, IPCA does not even allege facts that would be sufficient to support its claim of irreparable harm. *See Wisconsin Gas v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985).

A. The Prepaid Industry Has Had Ample Opportunity To Protect Itself From A Rate Increase

To begin with, all of IPCA’s irreparable harm arguments lack merit, because, as APCC explained in its *Immediate Implementation Ex Parte*,² prepaid card providers have had ample time to prepare for the implementation of a new rate. *Id.* at 2. More than two years ago, the PSPs initiated this proceeding by filing petitions proposing essentially the same rate increase that the Commission has now ordered. *Order*, ¶ 14. At that time, the PSPs submitted detailed cost studies supporting the proposed rate. *Id.*, ¶ 26 & n.77. Thus, the prepaid card industry has been aware for more than two years that a rate increase was likely. Moreover, IPCA itself raised the issue of increasing the

(Footnote continued)
subject to judicial review (5 U.S.C. § 611), and IPCA has not shown that the Commission’s determination in that analysis of the number of prepaid service providers affected in any manner its final decision. *Thompson v. Clark*, 741 F.3d 401 (D.C. Cir. 1984). Therefore, IPCA cannot possibly prevail on the merits on this basis.

² Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, June 28, 2004, at 2 (“*Immediate Implementation Ex Parte*”).

payphone surcharge in its comments filed in this proceeding ten months ago. See Comments of IPCA, filed December 2, 2003.

Once they became aware of the proposed rate increase, card issuers could have increased payphone surcharges to the extent necessary to protect themselves in advance.³ At a minimum, if they did not already do so, they could have provided expiration dates on any cards issued after they learned of the rate increase proposal, and could have approached state public service commissions to ensure that any existing rate caps would not interfere with their ability to recover the proposed rate increase.

IPCA, however, does not identify any steps that the pre-paid card industry has taken to prepare itself and its customers for a rate increase. If the party alleging irreparable harm will not even help itself by taking steps to mitigate the harm, it should not expect any help from the Commission. The party seeking a stay “must show that the alleged harm will directly result from the action which the movant seeks to enjoin” (*Wisconsin Gas*, 758 F.2d at 674), not from its own failure to take reasonable steps to protect itself.

Furthermore, the industry still has time to protect itself. The first significant compensation payments at the new rate will not come due until April 1, 2005.⁴ Thus,

³ In fact, currently issued cards commonly carry surcharges of \$.65 - \$.80, or roughly three times the old \$.24 compensation rate. *Immediate Implementation Ex Parte* at 2-3. Even if such existing surcharges are not sufficient to recover fully the costs under the new rate, they appear to provide an ample “cushion” of revenue to enable card providers to weather any transitional period that might be required prior to a further increase in the surcharge.

⁴ The *Order* was published in the Federal Register on August 26, 2004, with an effective date of September 27, 2004. 69 Fed. Reg. 52444 (Aug. 26, 2004). Compensation is billed on a quarterly basis, with payments made three months after the close of a calendar quarter. Thus, the earliest payments at the new rate will be made January 1, 2005, but they will only cover the last four days of the third quarter of 2004 (September 27-30, 2004). The first significant payments at the new rate will cover the fourth quarter of 2004 and will not be received by PSPs until April 1, 2004.

even if prepaid card providers could not increase their rates on the cards in use today, they can certainly have increased rates in effect by the time they will begin making substantially increased payments under the new rate, six months from now. IPCA does not show why the additional cash flow gained by the industry from increasing its surcharges (or other rates) by April 1, 2005, would not suffice to avoid irreparable harm, even if the surcharges could not be increased in time to apply to the actual calls that are subject to the April 1, 2005 compensation payments.

B. IPCA's Claims Of Irreparable Harm Are Entirely Speculative

Even assuming that prepaid card surcharges could not have been increased earlier and must now be increased immediately in order to avoid irreparable harm, IPCA's claims of harm are entirely speculative. IPCA does not dispute that neither the FCC nor the vast majority of state public service commissions impose any limits on payphone surcharges assessed on prepaid card users.⁵ IPCA also does not dispute that, as documented in APCC's *Supplemental Immediate Implementation Ex Parte*,⁶ prepaid cards and advertisements almost uniformly state that "[r]ates and service charges are subject to change without prior notice." *Id.* at 3. Therefore, IPCA's members will not be irreparably harmed in any event, because they can immediately raise the payphone surcharge applicable to most calls made on existing cards.

IPCA argues that raising the surcharge on existing cards would itself cause harm in the form of "massive confusion on the part of the consumer" and damage to

⁵ According to IPCA, there are only "approximately seven states" that cap the payphone surcharge. IPCA Petition at 3. *See below.*

⁶ Supplemental Ex Parte re Immediate Implementation of Revised Compensation Rate, Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer and Robert F. Aldrich, June 28, 2004, at 2 ("*Supplemental Immediate Implementation Ex Parte*"). With this ex parte, APCC filed 18 exhibits showing prepaid cards and advertisements for prepaid cards using the "without prior notice" language.

the “good reputation of the phonecard issuer and the retailers who sold the cards” and “the good relations a phonecard issuer has with his distributors.” IPCA Petition at 2, 6. Yet, IPCA also points out that its members can alleviate any such harm by providing voice prompts that notify consumers of the increased rate and by posting revised rate information at the point of sale.⁷ Although IPCA complains of the costs that members would incur in taking these steps, IPCA does not deny that they can be taken or that the industry is able to recover such one-time costs over a reasonable period.

IPCA also contends that, even though prepaid cards uniformly warn consumers that rates can be increased without notice, and even though card issuers could use voice-prompts to notify consumers of the rate change, “some” regulatory agencies could view a precipitous rate change as “possibly” in violation of rate disclosure requirements and “possibly” a deceptive trade practice. IPCA Petition at 6. Mere possibilities cannot justify a stay. *Wisconsin Gas v. FERC*, 758 F.2d at 674. Moreover, any such charges of deception could apply only to cards that were purchased before the surcharge was increased. As admitted by IPCA (IPCA Petition at 4), however, and as detailed in APCC’s *Supplemental Immediate Implementation Ex Parte*, many cards have expiration dates, frequently expiring within 90 days of first use. Thus, reasonably cautious card issuers have already protected themselves by adding expiration dates to the cards currently in use. Given the longstanding, patently obvious risk of a compensation rate increase, there is no excuse for a card issuer failing to take this simple step to protect itself.

⁷ IPCA Petition at 4, 6. IPCA also provides no evidence that any consumer confusion that does occur would cause irreparable harm.

C. State Rate Caps Could Not Cause Irreparable Harm

IPCA also claims that the precautions discussed above would not be feasible in all cases, because “[a]pproximately seven states cap the DAC charge permissible on prepaid phonecards, and that cap is \$.24 per call.” IPCA Petition at 3. IPCA does not, however, identify the states, describe the nature of the caps (*e.g.*, whether they are “soft” or “hard” caps), or estimate the percentage of prepaid calls and revenues that are affected by the caps. Furthermore, even if supported, rate caps imposed by seven states could not affect more than a small fraction of total industry revenues could be affected by. States have no jurisdiction to regulate caps on interstate rates or on the high-priced international calls that reportedly comprise a large share of prepaid industry revenues.

Moreover, IPCA does not allege that its members have approached the public service commissions in the affected states to request temporary relief from the alleged caps. As noted above, irreparable harm resulting from prepaid card providers’ failure to take timely steps to protect themselves cannot justify a stay. *Wisconsin Gas v. FERC*, 758 F.2d at 674.

Since IPCA has failed to show that its members would incur irreparable harm, the Commission should deny a stay. *See, e.g., EarthLink, Inc., v. SBC Communications, Inc.*, File No. EB-04-MD-006, Order, DA 04-2912, ¶ 2, n.5 (Enf. Bur., rel. Sept. 14, 2004)(failure to show irreparable harm enables Commission to dispose of a stay request without examining other factors).

III. A STAY WOULD INJURE PSPs AND THE PUBLIC INTEREST

Even if IPCA had shown some degree of irreparable harm, it is outweighed by the injury a stay would cause to PSPs and to the public interest.

IPCA contends that a stay of the new rate would serve the public interest, alleging that the \$.494 rate will have a negative impact on the poor and disadvantaged and a counter-productive impact on the policy goal of universal service. IPCA Request at 2.⁸ Even if the new rate did cause such harm, a stay would not prevent but only postpone the harm. But IPCA offers no facts to support its claim of harm, other than the naked assertion that “phonecards provide the least expensive means of making long distance calls for those without home phone service, or without home long distance service.” *Id.* This assertion is unsupported and there is reason to doubt it. Coin long distance rates in the payphone industry have become highly competitive. Payphones routinely offer bargains such as \$1.00 for three minutes, \$1.00 for four minutes, or the “Perfect 10” rate of \$1.00 for 10 minutes. Thus, consumers will continue to have low-priced calling options in any event.

More fundamentally, as the record in this proceeding makes clear, neither phone cards nor coins can be used to make inexpensive long distance calls if there is no available phone at which to make the calls. The compensation rate increase ordered by the Commission is ultimately grounded in the undisputed fact that, while the payphone industry has been waiting for a rate increase, the installed base of payphones has declined alarmingly, and continues to do so. To stem that decline, the industry must receive the infusion of revenue that the \$.49 rate will bring as quickly as possible. Further delaying a compensation rate increase that was already shown to be needed at least two years ago will cause far more harm than benefit to the payphone-using public, and the harm to the public and to PSPs from delaying the increase far outweighs any harm to prepaid card providers from its immediate implementation.

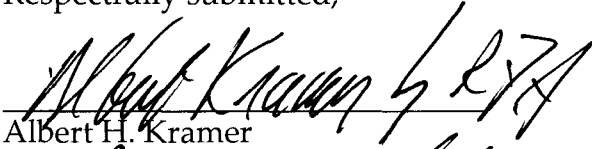
⁸ IPCA’s claim that immediate implementation of the compensation rate increase would lead to consumer confusion is disposed of in the preceding section.

CONCLUSION

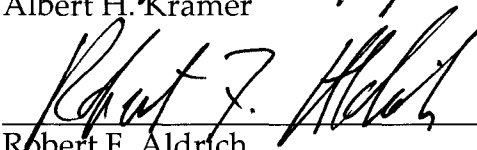
For the foregoing reasons, the Commission should deny IPCA's request for stay.

Dated: October 12, 2004

Respectfully submitted,



Albert H. Kramer



Robert F. Aldrich

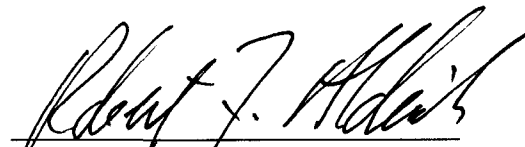
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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2004, the foregoing Opposition of the American Public Communications Council to the Request for Stay of the International Prepaid Communications Association was delivered via first-class U.S. Mail, postage pre-paid to the following:

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